

No. 45571-4-II
COURT OF APPEALS,
DIVISION II,
STATE OF WASHINGTON



MARCUS and SUZANNE GERLACH,

Appellants,

v.

CITY OF BAINBRIDGE ISLAND,

Respondent.

RESPONDENT CITY OF BAINBRIDGE ISLAND'S
RESPONSE BRIEF

James E. Haney, WSBA #11058
Attorneys for City of Bainbridge Island
OGDEN MURPHY WALLACE, P.L.L.C.
901 Fifth Avenue, Suite 3500
Seattle, Washington 98164-2008
Tel: 206.447.7000/Fax: 206.447.0215

TABLE OF CONTENTS

	<i>Page</i>
A. INTRODUCTION	1
B. RESTATEMENT OF THE ISSUES	3
C. RESTATEMENT OF THE CASE	4
1. The Gerlachs applied for a mooring buoy permit in 2005, which occasioned their initial interaction with Joshua Machen.	4
2. In 2010, the Gerlachs were denied a “programmatic” buoy, which resulted in a contingent settlement to resolve their administrative appeal. The contingent settlement did not include an express contractual obligation of good faith.	7
3. The U.S. District Court dismissed the Gerlachs’ lawsuit for delay damages, which was premised upon retaliation as a result of the Gerlachs’ refusal to hire Machen to wash their windows.	8
4. The Gerlachs filed for a new SSDP application in 2012, which is the subject of this appeal, a portion of which was denied based upon objective criteria relating to concrete bulkheads and without a public hearing or Planning Commission involvement.	10
D. ARGUMENT	17
1. Standard of Review	17
2. The Gerlachs’ request for declaratory relief was properly dismissed because adequate alternative remedies were and are still available.	18
a. The Hearing Examiner may determine whether the Gerlachs’ SSDP application was denied properly or for unlawful reasons; the City Attorney did not mislead the trial court regarding the Hearing Examiner’s authority.	21
b. The Gerlachs may appeal the Hearing Examiner’s decision to the Shoreline Hearings Board.	25
3. The appearance of fairness doctrine does not apply to the Planning Director’s decision on the Gerlachs’ SSDP application where no public hearing was held.	26
4. The Gerlachs’ allegations regarding improper conduct by Maradel Gale, even if true, do not implicate the appearance	

{KNE1154938.DOCX;1/13023.050001/ }

	of fairness doctrine because she was not a decisionmaker on the Gerlachs' SSDP application.....	32
5.	There is no authority in law to transfer the Gerlachs' permit to Kitsap County.	35
6.	The City's conduct did not violate any duty of good faith and fair dealings.....	38
7.	The Gerlachs are collaterally estopped from re-litigating the same factual issues regarding Machen's solicitation of the Gerlachs and the processing of their original mooring buoy permit applications.....	40
8.	Should the Court determine that summary judgment was improperly granted to the City, the trial court still correctly denied summary judgment in favor of the Gerlachs where the City raised multiple issues of material fact.....	44
E.	CONCLUSION.....	47

TABLE OF AUTHORITIES

	<i>Page</i>
Cases	
<i>Ahmad v. Town of Springdale</i> , __ Wn. App. __, 314 P.3d 729, 733 (2013).....	38
<i>Badgett v. Security State Bank</i> , 116 Wn.2d 563, 569, 807 P.2d 356 (1991)	39
<i>Barrett v. Weyerhaeuser Co. Severance Pay Plan</i> , 40 Wn. App. 630, 635-36 n. 6, 700 P.2d 338 (1985)	39
<i>Buell v. City of Bremerton</i> , 80 Wn.2d 518, 523, 495 P.2d 1358 (1972)....	27
<i>Carrick v. Locke</i> , 125 Wn.2d 129, 143 n. 8, 882, P.2d 882 (1994).....	33
<i>Dunlap v. City of Nooksack</i> , SHB No. 02-026, 2003 WL 1827236 at *3 (April 3, 2003)	25
<i>Ellensburg Cement Products, Inc. v. Kittitas County</i> , __ Wn.2d __, 317 P.3d 1037, 1042 (2014)	30
<i>Families of Manito v. City of Spokane</i> , 291 P.3d 930, 938-39 (2013)	29, 30, 31
<i>Gerlach v. City of Bainbridge Island</i> , Cause No. 3:11-cv-05854-BHS 4, 8, 41	
<i>Gerlach v. City of Bainbridge Island</i> , No. 12-35888	4, 9, 42
<i>Grandmaster Sheng-Yen Lu v. King County</i> , 110 Wn. App. 92, 98, 38 P.3d 1040 (2002).....	17, 18, 19, 20, 37
<i>Harrington v. Spokane County</i> , 128 Wn. App. 202, 205, 114 P.3d 1233 (2005).....	26
<i>Hayden v. Port Townsend</i> , 28 Wn. App. 192, 622 P.2d 1291 (1981) 34, 35	
<i>Impecoven v. Department of Revenue</i> , 120 Wn.2d 357, 365, 841 P.2d 752 (1992).....	18
<i>Lake v. Woodcreek Homeowners Ass’n</i> , 169 Wn.2d 516, 526, 243 P.3d 1283 (2010).....	17
<i>Leland v. Frogge</i> , 71 Wn.2d 197, 201, 427 P.2d 724, 727 (1967).....	18
<i>Plein v. Lackey</i> , 149 Wn.2d 214, 222, 67 P.3d 1061 (2003).....	36
<i>Polygon Corp. v. City of Seattle</i> , 90 Wash.2d 59, 67–68, 578 P.2d 1309 (1978).....	29, 31
<i>Raynes v. City of Leavenworth</i> , 118 Wn.2d 237, 245, 821 P.2d 1204 (1992).....	27
<i>Reeder v. King County</i> , 57 Wn.2d 563, 564, 358 P.2d 810 (1961)	19
<i>Richards v. City of Pullman</i> , 134 Wn. App. 876, 883, 142 P.3d 1121 (2006).....	20

<i>Rubenser v. Felice</i> , 58 Wn.2d 862, 365 P.2d 320 (1961).....	18
<i>Samuel's Furniture, Inc. v. State, Dept. of Ecology</i> , 147 Wn.2d 440, 449, 54 P.3d 1194 (2002)	25
<i>Smith v. Skagit County</i> , 75 Wn.2d 715, 453 P.2d 832 (1969) .	26, 27, 28, 30
<i>Stafne v. Snohomish County</i> , 174 Wn.2d 24, 40, 271 P.3d 868 (2012).....	20
<i>State v. Finch</i> , 137 Wn.2d 792, 808, 975 P.2d 967 (1999).....	32
<i>State v. Post</i> , 118 Wn.2d 596, 618, 826 P.2d 172 (1992).....	33
<i>State v. Vasquez</i> , 148 Wn.2d 303, 308, 59 P.3d 648 (2002).....	43
<i>Wagers v. Goodwin</i> , 92 Wn. App. 876, 882, 964 P.2d 1214 (1998)	19
<i>Washington State Physicians Ins. Ex. & Ass'n v. Fisons Corp.</i> , 122 Wn. 2d 299, 858 P.2d 1054 (1993)	32
<i>Zehring v. City of Bellevue</i> , 103 Wn.2d 588, 591, 694 P.2d 638 (1985) 29, 30, 31	

Statutes

42 U.S.C. § 1983.....	8, 9, 41
RCW 36.70B.020(3).....	30
RCW 36.70B.050.....	31
RCW 36.70B.060.....	31
RCW 36.70B.110(2)(e)	31
RCW 42.36	26, 27
RCW 42.36.010	27, 32
RCW 42.36.090.....	36
RCW 64.40	8
RCW 64.40.020(2).....	9
RCW 90.58.140	25
RCW 90.58.180	20, 25

Other Authorities

14A <i>Washington Practice: Civil Procedure</i> § 25:10 (2d ed.)	32
BIMC 16.12.360.E.3.....	11
BIMC 16.12.360.E.4.....	11, 31
BIMC 16.12.360.E.4.f	12
BIMC 16.12.370	11, 20, 21
BIMC 16.12.370.A.3	11, 21
BIMC 2.16.020.J.....	14
BIMC 2.16.130.....	21

A. INTRODUCTION

This appeal presents relatively simple legal questions relating to the application of the appearance of fairness doctrine. The Gerlachs essentially contend that because they refused City planner Joshua Machen's alleged solicitation related to his window washing business, they have been the victims of retaliation and have been unfairly treated by the City of Bainbridge Island ("City") in the processing of and decisionmaking on their shoreline permits for the past 10 years. Though the City vehemently disputes the Gerlachs' version of the facts, and has already disputed these facts in multiple forums before, this Court need not delve into such factual quagmires and, instead, may decide this appeal based upon issues of law.

In their Opening Brief, the Gerlachs have made little attempt to provide the Court with any legal authority contradicting the trial court's well-founded decision. This is likely because the legal issues presented by the Gerlachs' appeal have already been settled by the courts. Namely, Washington courts have refused to grant declaratory relief where an adequate remedy is available at law. The Gerlachs have available remedies in appealing what they perceive to be an improper denial of their concrete bulkhead permit to the City's Hearing Examiner and the

{KNE1154938.DOCX;1/13023.050001/ }

Shoreline Hearings Board, neither of which the Gerlachs allege are incapable of hearing their appeals. Washington courts have also established that the appearance of fairness doctrine does not apply to administrative decisions where no public hearing is held. The Planning Director's decision on the Gerlachs' concrete bulkhead was made without a public hearing. The first public hearing available in the City's land use process relating to Shoreline Substantial Development Permits ("SSDP") is an open-record appeal hearing before the Hearing Examiner. The Planning Commission did not make any recommendations or decisions with respect to the Gerlachs' SSDP application; thus, City Planning Commissioner Maradel Gale's letter to the City Planner requesting denial of the Gerlachs' permit, sent in her individual capacity, cannot be the basis for a successful appearance of fairness challenge. Finally, the Gerlachs' requested remedy, transfer of their permit to another jurisdiction for processing, is not an available remedy at law.

To the extent this Court finds that the trial court erred as a matter of law, the Court may either conclude that: (1) the Gerlachs are collaterally estopped from arguing the City's alleged bias resulting from the Gerlachs' refusal to hire Joshua Machen's window washing business has resulted in an appearance of fairness violation; or (2) the case must be

remanded to the trial court to resolve material issues of fact, precluding summary judgment in favor of the Gerlachs.

B. RESTATEMENT OF THE ISSUES

Have the Gerlachs' presented a justiciable controversy entitling them to declaratory relief where an adequate alternative remedy is available at law by appealing the permit decision to the Hearing Examiner and to the Shoreline Hearings Board? [NO.]

Does the appearance of fairness doctrine apply to the Planning and Community Development Director's administrative decision on the Gerlachs' permit application where no public hearing is required? [NO.]

Even assuming the appearance of fairness doctrine applies, does the letter of Maradel Gale, a member of the City's Planning Commission, constitute a violation of the doctrine where the Planning Commission was not involved in any aspect of the decisionmaking on the Gerlachs' permit? [NO.]

Are the Gerlachs entitled to transfer of their permit to Kitsap County for review where there is no legal authority requiring or allowing such a transfer? [NO.]

Must the Court remand the case for resolution of disputed factual issues should the Court reverse the trial court's decision as a matter of law? [PERMISSIBLE, BUT NOT NECESSARY.]

C. RESTATEMENT OF THE CASE

The City has exhaustively litigated the factual allegations raised by the Gerlachs both before the trial court and before the U.S. District Court for the Western District of Washington in *Gerlach v. City of Bainbridge Island*, Cause No. 3:11-cv-05854-BHS, which was recently upheld by the Ninth Circuit, Cause No. 12-35888 (9th Cir. Jan. 6, 2014). Because the Gerlachs have raised mostly duplicative factual argument on appeal, the City addresses the Gerlachs' lengthy shoreline permitting history again below.

1. The Gerlachs applied for a mooring buoy permit in 2005, which occasioned their initial interaction with Joshua Machen.

The Gerlachs purchased a waterfront home on Eagle Harbor in the City of Bainbridge Island in 2004. CP 51. Prior to filing the Shoreline Substantial Development Permit application ("SSDP permit") at issue in this appeal, they applied for a mooring buoy permit from the City in 2005. CP 52. The Gerlachs previously characterized the mooring buoy permit process as "unnecessarily difficult," the City having "forced" the Gerlachs

to file four separate applications to finally obtain their permit, and similarly stated in their Opening Brief that they sought shoreline permits from the City between 2005 and 2011. CP 27; Opening Brief at 8, 14. However, the Gerlachs themselves caused the extensive delays in obtaining the mooring buoy permit. The Gerlachs voluntarily withdrew their application in 2006 and did not contact the City again to request a permit until four years later in 2010. CP 243.

Mr. Gerlach alleges that during his initial contact with the City in 2005 and 2006 to apply for the mooring buoy permit, Joshua Machen, then an Associate Planner and now the City's Planning Manager, solicited Mr. Gerlach to hire Machen's private window washing business while his application was pending. CP 52; Opening Brief at 8. According to Machen, this accusation is untrue. CP 276. Mr. Gerlach came to the City's permit counter, presumably to discuss the buoy, and became heated, demanding to know whether Machen "even knew where he lived." *Id.* Machen responded that he did know where Mr. Gerlach lived, as he had done work (washing windows) for the Gerlachs' neighbor to the south, a woman named Maurine Rodal. *Id.* Machen did not solicit Mr. Gerlach for business, and nor did he imply that Mr. Gerlach's application would be impacted in any way. *Id.* As Machen previously stated in his

Supplemental Declaration filed in U.S. District Court, had Mr. Gerlach asked Machen to work on his home, Machen would have declined in light of the conflict of interest. *Id.* Machen also never directed any of his employees to speak with the Gerlachs to solicit their business. *Id.*

Mr. Gerlach states that the City “was aware of Machen’s private business and the ‘obvious’ conflict of interest as early as 2003,” when the City’s then-City Manager, Lynn Nordby, wrote a memorandum to Machen, cautioning him against soliciting applicants for their window-washing business. CP 52; Opening Brief at 15. But, as Mr. Nordby has previously stated before the U.S. District Court, he considered Machen to be an ethical employee and did not intend to discipline or criticize Machen about anything he had done wrong or any specific conduct. Mr. Nordby further stated that he was not aware of Machen ever having engaged in any “quid pro quo” for land use permits. CP 203-04.

The City recently conducted an internal investigation into the Gerlachs’ allegations against Machen, which determined that Machen had not committed any ethics violations relating to his window washing business. Though the Gerlachs extensively criticize and complain about the investigation, it was not considered by the trial court, nor is it properly part of the record before this Court. Opening Brief at 22-23.

2. In 2010, the Gerlachs were denied a “programmatic” buoy, which resulted in a contingent settlement to resolve their administrative appeal. The contingent settlement did not include an express contractual obligation of good faith.

In 2010, Mr. Gerlach re-initiated contacts with the City and submitted an application for a “programmatic” buoy. CP 244. The programmatic buoy process is essentially a “fast track program” allowing residents to register and permit common mooring buoys. *Id.* Because the program has inflexible requirements, it is generally not well-suited for unique or unusual buoy design. *Id.* Notably, the City cautioned the Gerlachs that it could prove difficult to obtain such a permit because of the depth and location of the Gerlachs’ proposed buoy. CP 256. Several months after Mr. Gerlach filed his programmatic buoy application, the City denied the application for several reasons directly related to the programmatic buoy criteria. CP 244-45, 267.

Mr. Gerlach appealed the City’s denial of his programmatic buoy application on February 28, 2011. CP 245. The City and the Gerlachs entered into a contingent settlement, in which the Gerlachs finally agreed to pursue a Shoreline Substantial Development Permit (“SSDP”). During the negotiations for the contingent settlement, Mr. Gerlach’s attorney, Dennis Reynolds, and the then-City Attorney Jack Johnson exchanged multiple e-mails. CP 206-10. Mr. Reynolds stated that his clients, the

{KNE1154938.DOCX;1/13023.050001/ }

Gerlachs, insisted that language be inserted into the settlement agreement that the City would act in good faith regarding all future permit applications submitted by the Gerlachs. CP 208. Mr. Johnson responded, stating, “The City has an obligation to treat the applications of the Gerlachs and every other citizen in good faith, but I am not going to have the City make such general obligations into contractual settlement terms. The Gerlachs need not fear retaliation.” CP 207. Thus, a contractual commitment to process the Gerlachs’ applications in good faith was expressly rejected by the City and was not incorporated into the settlement agreement, despite Mr. Gerlach’s assertions otherwise. CP 207, 52; Opening Brief at 11, 14-15, 18, 28. The Gerlachs’ SSDP permit was promptly granted on August 4, 2011. CP 245.

3. The U.S. District Court dismissed the Gerlachs’ lawsuit for delay damages, which was premised upon retaliation as a result of the Gerlachs’ refusal to hire Machen to wash their windows.

The Gerlachs sued the City and Machen in September 2011, alleging claims under RCW 64.40, 42 U.S.C. § 1983 (substantive due process), and “intentional interference with quiet enjoyment of property.” CP 216. The City removed the lawsuit to the U.S. District Court, Western District of Washington, under Cause No. 3:11-cv-05854-BHS. In April

2012, the City moved for summary judgment, which was granted on August 7, 2012. CP 212, 216.

In granting the City's Motion for Summary Judgment, Judge Settle noted that the inference made by the Gerlachs that Machen was soliciting their business and basing a permit decision on their lack of patronage was "essentially a conclusory inference unsupported by the facts." CP 225. Judge Settle further stated that, even assuming the Gerlachs' allegations were true, the Gerlachs "failed to show that the justifications given for denying the permit were unreasonable or that there was a lack of a legitimate governmental objective." CP 225. In addition, the Order stated the Gerlachs had failed to prove that Machen's "alleged abuse of power" was the cause of their programmatic buoy permit denial "where the decision to deny the permit was made by a group of officials, rather than in Machen's sole discretion." CP 225. Judge Settle awarded the City its attorney fees pursuant to RCW 64.40.020(2). The Gerlachs moved for reconsideration, which was denied, and appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit affirmed, stating that the Gerlachs' § 1983 claim against Machen failed because they had "not adduced evidence to prove that Machen caused their alleged injuries." *Gerlach v. City of Bainbridge Island*, No. 12-35888, slip op. at 3 (9th Cir. Jan. 6, 2014).

4. The Gerlachs filed for a new SSDP application in 2012, which is the subject of this appeal, a portion of which was denied based upon objective criteria relating to concrete bulkheads and without a public hearing or Planning Commission involvement.

On July 31, 2012, the Gerlachs filed a new SSDP application to build a 110 linear-foot bulkhead; a 174-foot dock; a 196 square-foot gatehouse/boathouse; and a 50 linear-foot retaining wall on their property. CP 52, 228. Given the Gerlachs' (unfounded) insistence in the past that Joshua Machen had retaliated against the Gerlachs and improperly denied their permits based upon their decision not to hire Machen to wash their windows, the City's Planning Director, Kathy Cook, assigned the Gerlachs' permit application to Associate Planner Heather Beckmann for review. CP 229, 236, 240. Machen has not been involved in reviewing or commenting upon the Gerlachs' SSDP application in any way since it was received by the City. *Id.* In fact, the Gerlachs' permit application has never been shown to Machen, and it has never been discussed in Machen's presence. *Id.* Ms. Cook directed Ms. Beckmann to report directly to her on any matters involving the Gerlachs' application so as to avoid any possibility the Gerlachs could claim Machen retaliated against them when reviewing their permit application. *Id.*

The City's Code establishes the administrative process used to review and issue Shoreline Substantial Development Permit applications. CP 237. Namely, the Department of Planning and Community Development Director ("Planning Director") issues an administrative decision on a Shoreline Substantial Development Permit application. *Id.*; BIMC 16.12.360.E.4. No public hearing on the underlying permit decision (the SSDP) is permitted. *Id.* Rather, the Planning Director issues a written decision, containing findings of fact and conclusions of law, approving, denying, or approving with modifications any substantial development permit without a public hearing. *Id.* Pursuant to BIMC 16.12.370, only when an applicant timely appeals a decision of the Planning Director on an SSDP application is an open record hearing held before the City's hearing examiner. *Id.*; BIMC 16.12.370.A.3.

Prior to the issuance of the Planning Director's decision, a notice of application is published and a 30-day public comment period is opened for interested persons to comment on an SSDP application. CP 237; BIMC 16.12.360.E.3. During the public comment period on the Gerlachs' application between September 14 and October 14, 2012, 11 comments were received, including one written letter from Maradel Gale, a member of the City's Planning Commission. CP 90-91, 229. This letter was

written by Ms. Gale as a private citizen, recommending denial of the Gerlachs' requested bulkhead. *Id.* Contrary to Mr. Gerlach's assertions, Ms. Gale's letter did not contain any language "directing" Ms. Beckmann to deny the permit application but, rather, requested denial as concerned citizens are apt to do for any land use permit. *Id.*; Opening Brief at 10.

The Planning Commission had absolutely no involvement in the City's processing of the Gerlachs' SSDP application. CP 237. The City Code provides that the Planning Director "may refer [an SSDP] application to the planning commission for review and recommendations prior to deciding the application" and that the application "shall also be referred to the planning commission for a recommendation at the request of the applicant." *Id.*; BIMC 16.12.360.E.4.f. However, the Planning Director did not refer the Gerlachs' application to the Planning Commission for review and recommendation prior to issuing her decision. CP 237. Further, the Gerlachs did not request that the planning commission review their application. CP 238. In response to a letter received from the Gerlachs, City Manager Doug Schulze wrote to the Gerlachs on January 11, 2013, further emphasizing the fact that the Planning Commission would not be involved in reviewing the Gerlachs' application: "Ms. Gale, in her role as a Planning Commissioner, has

absolutely no involvement in the permit application review process.” CP 100.

Of note, two other written comments were received on the Gerlachs’ application during the public comment period that were signed by anonymous citizens. CP 229. Ms. Beckmann knew the identity of one of these commenters but, according to Ms. Beckmann, Mr. Gerlach never directly asked her to reveal his identity. Rather, Mr. Gerlach merely asked Ms. Beckmann whether it was common for the City to receive anonymous comments, and Ms. Beckmann responded that the City had received anonymous comments before. CP 229-30. However, Mr. Gerlach contacted the Bainbridge Island Police Department following receipt of the anonymous letters, alleging that one of the authors had trespassed onto his property to take photographs and make observations related to his comments. CP 230. Ms. Beckmann subsequently informed the investigating police officer of the commenter’s identity, Bruce Woolever, and Mr. Gerlach later discovered the identity of the commenter through the City Police Department investigation report on his trespass complaint. *Id.*

On December 21, 2012, the City received a letter from the Gerlachs requesting that the City relinquish review of the Gerlachs’ SSDP

application to Kitsap County for review. City Manager Doug Schulze responded to the Gerlachs on January 11, 2013, denying their request to transfer the permit application to Kitsap County. CP 100. Mr. Schulze stated that the Gerlachs' request was "highly unusual" and that he could see no reason to engage another agency in review of their permit application given that the City staff would provide a full and thorough review of the application. *Id.*

On March 22, 2013, after the Gerlachs filed their Complaint for Declaratory Relief in the superior court, the City issued a Notice of Administrative Decision approving the Gerlachs' application to build a gatehouse/boathouse, retaining wall, and dock (subject to conditions), and denying the application to build the proposed concrete bulkhead. CP 231, 238. No injunctive relief or any other court order preventing the City from issuing its decision had been issued at the time. Thus, the City issued its decision on the application to prevent any further argument from the Gerlachs that their permit had been unreasonably delayed.¹ The City denied the Gerlachs' application to build the concrete bulkhead for several reasons, including the fact that hard armored or concrete bulkheads are not

¹ Nevertheless, the Gerlachs still allege that the City violated BIMC 2.16.020.J., establishing time periods for making land use decisions, without any supporting discussion whatsoever. Opening Brief at 31.
{KNE1154938.DOCX;1/13023.050001/ }

permitted in areas with designated marshes, are only permitted where the site is experiencing serious wave erosion, and other preferred methods of shoreline armoring are available. CP 231.

Mr. Gerlach alleges the City treated his applications disparately by permitting numerous mooring buoys surrounding the Gerlachs' property while denying, ignoring, or returning their applications. Opening Brief at 8. Though the Gerlachs do not specify in their Opening Brief the specific properties they are referring to, at the trial court level, the Gerlachs alleged that the City treated their application differently than that for the Lovell property, which was issued a permit (SSDE 12757) in 2004 for the construction of a 78-foot bulkhead. CP 53. However, neither the City's Shoreline Master Program, nor any other provision of the City code authorizes a hard-armored (concrete) bulkhead for a shoreline site simply because other properties near the applicant's site may already have them, or because much of the built shoreline environment may have them. CP 231. In fact, different circumstances arose during the nine-year period between the Gerlachs' application and the issuance of SSDE 12757 justifying the different outcomes reached on these permit applications. CP 231-33. These changing circumstances included that the City identified the Gerlach property as being located adjacent to a marsh and the

Shoreline Hearings Board issued rulings affecting the approval criteria for new bulkheads. *Id.* Moreover, the site characteristics for the Gerlach property and the Lovell property were distinguishable. *Id.*

In addition, Mr. Gerlach alleges that the City treated his application differently by requiring him to obtain a marine survey that had been completed within two years of his SSDP application. CP 52-53. Mr. Gerlach is referring to eelgrass surveys, which City staff utilizes to analyze the potential impacts of development in the shoreline. CP 230. While Ms. Beckmann requested a site-specific and current (within two years) eelgrass survey from Mr. Gerlach, this requirement is the Washington Department of Fish and Wildlife's standard practice and was not uniquely applied to the Gerlachs as a result of any retaliatory or improper motive. *Id.*

While this litigation was pending, the Gerlachs' filed an appeal of the Planning Director's decision denying his application for a concrete bulkhead on March 28, 2013. The Hearing Examiner has stayed the administrative appeal pending the outcome of this appeal.

D. ARGUMENT

1. Standard of Review.

A trial court's determination that a completely adequate alternative remedy is available, thus refusing consideration of a declaratory judgment action, is reviewed only for an abuse of discretion. *Grandmaster Sheng-Yen Lu v. King County*, 110 Wn. App. 92, 99, 38 P.3d 1040 (2002). A trial court abuses its discretion only when its decision is manifestly unreasonable or based on untenable grounds. A court's decision is manifestly unreasonable if it is outside the range of acceptable choices given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; or it is based on untenable reasons if it is based on an incorrect standard or if the facts do not meet the requirements of the correct standard. *Id.*

The Court of Appeals reviews a summary judgment decision *de novo*, engaging in the same inquiry as the trial court. *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010). Summary judgment is warranted if there is no genuine issue regarding any material fact and where the moving party is entitled to judgment as a matter of law. CR 56(c). In this case, the City requested that summary judgment be granted in its favor, despite being the nonmoving party,

because the Gerlachs were not entitled to judgment as a matter of law, even assuming all of their factual assertions to be true. In other words, the law compelled dismissal of the Gerlachs' claims regardless of the existence of factual disputes. *See, e.g., Rubenser v. Felice*, 58 Wn.2d 862, 365 P.2d 320 (1961); *Impecoven v. Department of Revenue*, 120 Wn.2d 357, 365, 841 P.2d 752 (1992) (summary judgment for nonmoving party entered by appellate court); *Leland v. Frogge*, 71 Wn.2d 197, 201, 427 P.2d 724, 727 (1967) (there is authority for granting summary judgment for a nonmoving party; it would be expected that such judgment would be either one of dismissal, or for relief sought by or uncontestedly due that second party).

2. The Gerlachs' request for declaratory relief was properly dismissed because adequate alternative remedies were and are still available.

The Gerlachs' complaint requested declaratory relief, *i.e.*, an order of the court determining that the City had violated the appearance of fairness doctrine and that the Gerlachs' SSDP application must be transferred to Kitsap County for processing. CP 13. However, the Gerlachs are "not entitled to relief by way of a declaratory judgment if there is available a completely adequate alternative remedy." *Grandmaster Sheng-Yen Lu v. King County*, 110 Wn. App. 92, 98, 38 P.3d

1040 (2002) (citing *Reeder v. King County*, 57 Wn.2d 563, 564, 358 P.2d 810 (1961)).²

In *Grandmaster*, the court held that declaratory relief was improper where LUPA provided an adequate alternative remedy and was the exclusive means for judicial review of land use decisions. *Id.* There, King County, Weyerhaeuser, and the State Department of Natural Resources agreed to develop a piece of property for use as a gravel mine, which would require a conditional use permit if it were to occur within one-quarter mile from an established residence. Grandmaster, living within one-quarter mile of the property, filed a declaratory judgment action seeking an order directing King County to decide, prior to establishment of the final configuration of mining activities, whether a conditional use permit would be required for the proposed mining project. *Id.* at 96-98.

The *Grandmaster* court affirmed dismissal of Grandmaster's declaratory judgment action, concluding that there could "be no serious dispute that the ultimate decision by [the County] that is at issue here will

² Although declaratory relief may be available in certain circumstances if the court finds that other available remedies are unsatisfactory, "such situations justifying exceptional treatment are very rare." *Id.* at 106 (citing *Wagers v. Goodwin*, 92 Wn. App. 876, 882, 964 P.2d 1214 (1998) (holding that where the only alternative remedy was a motion to reopen an original dissolution judgment, a remedy granted only under extraordinary circumstances, the case fit into this category of exceptions)). The Gerlachs' case does not present such exceptional circumstances because a perfectly adequate remedy in the form of an appeal to the City's Hearing Examiner and Shoreline Hearings Board is available for them to pursue.

{KNE1154938.DOCX;1/13023.050001/ }

be a ‘land use decision’ within the meaning of [LUPA].” *Id.* at 100. Namely, prior to the commencement of the use, County approval would have been required in the form of a land use permit. *See also Richards v. City of Pullman*, 134 Wn. App. 876, 883, 142 P.3d 1121 (2006) (declaratory relief inappropriate where LUPA provided exclusive means of review for issuance of a notice of violation and order to correct a violation of the City’s land use code); *Stafne v. Snohomish County*, 174 Wn.2d 24, 40, 271 P.3d 868 (2012) (declaratory relief inappropriate where LUPA provided exclusive means of review of a boundary line adjustment).

In this case, the trial court’s decision that adequate alternative remedies were available to the Gerlachs, precluding a declaratory judgment in the Gerlachs’ favor, was not manifestly unreasonable or based on untenable grounds. Like in *Grandmaster*, there can be no serious dispute that a land use appeal process was and is readily available to the Gerlachs. The City’s decision to deny a portion of the Gerlachs’ SSDP application is appealable both to the City’s Hearing Examiner under BIMC 16.12.370 and, ultimately, the Shoreline Hearings Board pursuant to RCW 90.58.180, providing the Gerlachs with a clear land use appeal path. The Gerlachs have not alleged that either the Hearing Examiner or

the Shoreline Hearings Board is biased such that they would also be improper decisionmakers under the appearance of fairness doctrine.³ Thus, there is no excuse for failing to utilize this appeal process.

- a. The Hearing Examiner may determine whether the Gerlachs' SSDP application was denied properly or for unlawful reasons; the City Attorney did not mislead the trial court regarding the Hearing Examiner's authority.

The trial court correctly determined the Gerlachs have available a completely adequate alternative remedy in appealing the denial of a portion of their SSDP application first to the City's Hearing Examiner (which the Gerlachs have already done and is currently stayed pending the outcome of this appeal). Pursuant to BIMC 16.12.370⁴, when an applicant timely appeals a decision of the Planning Director on an SSDP application, an open record hearing is held before the City's hearing examiner. *See also* CP 273.

The Gerlachs make much of the City Attorney's briefing submitted to the City's Hearing Examiner regarding the scheduling of the Gerlachs'

³ Rather, the Gerlachs allege that "[a]ny permit decision must be **free** from any [appearance of fairness doctrine] violations **before** being brought to the [Hearing Examiner]." Opening Brief at 10. This argument is tantamount to arguing, incorrectly, that the appearance of fairness doctrine applies to administrative land use decisions made without a public hearing. *See* Part D.3, *supra*.

⁴ BIMC 16.12.370.A.3 provides: "If an appeal is filed, the case shall be reviewed as an open record hearing by the hearing examiner, who shall follow the procedures established in BIMC 2.16.130 or its successor."
{KNE1154938.DOCX;1/13023.050001/ }

administrative appeal on their SSDP application. In that briefing, in which the City Attorney urged the Hearing Examiner not to issue a stay, the City Attorney stated that the Hearing Examiner lacked the authority to decide issues relating to the appearance of fairness doctrine. The City Attorney reasoned that because an SSDP decision is made by staff without a public hearing per the City's municipal code, the appearance of fairness doctrine does not apply to the staff's SSDP decisions. The City Attorney further stated that the Hearing Examiner could only determine whether the Hearing Examiner was required to recuse himself from deciding the Gerlachs' open record appeal due to the appearance of fairness allegations they had raised, none of which implicated bias on the part of the Hearing Examiner. CP 434-35.

The City Attorney clarified before the trial court that, while the Hearing Examiner could not determine appearance of fairness violations directly (because the doctrine did not apply), the Hearing Examiner could determine whether the Gerlachs' requested permit for a concrete bulkhead met all of the criteria in the City's shoreline regulations and whether it was denied by the Planning Director and supporting planning staff solely on the basis of their alleged bias toward the Gerlachs. CP 339-40. Thus, the Gerlachs were and still are free to argue before the Hearing Examiner that

their permit was improperly denied as a result of the City planning staff's alleged bias rather than upon lawful permitting criteria. *Id.*

The City Attorney did not mislead the trial court as alleged by the Gerlachs and nor were his statements to the trial court and the Hearing Examiner contradictory. Opening Brief at 7, 9-10, 13, 23-24, 35. In both tribunals, the City Attorney asserted the appearance of fairness doctrine did not apply, such that the Hearing Examiner could not find a violation of the doctrine, but that the Hearing Examiner could examine and ferret out the reasons for the denial of the Gerlachs' permit to determine if they were valid or specious. At oral argument, the City Attorney echoed these arguments:

Mr. Haney: So I was -- as I was beginning to say, there is a completely adequate remedy here. As the Court knows, the planning director's decision is appealable to the City hearing examiner. And as the Court knows, hearing examiners are employed by cities to act as quasi-judicial officers conducting public hearings and appellate proceedings in order to ensure that the decisions that staff makes are correct based on city ordinances. . . .

I would also point out that the hearing examiner holds an open-record public hearing at which the Gerlachs will be able to present any and all evidence they may have that bears on the propriety of the planning director's decision; thus, the Gerlachs will have every opportunity to contest the decision before the neutral hearing examiner.

The Court: Including bringing up the appearance-of-fairness issue.

{KNE1154938.DOCX;1/13023.050001/ }

Mr. Haney: They can certainly bring up the issue of believing that the staff is biased and that the staff's decision is biased against them, yes. And the hearing examiner has the authority to cut through everything and decide what do the criteria require, and has the City made an appropriate decision.

RP 40-41.

The Court asked again regarding the Hearing Examiner's ability to consider the appearance of fairness doctrine:

The Court: So your interpretation of that statutory provision would allow Mr. Gerlach the opportunity to raise the issue with the hearing examiner?

Mr. Haney: Yes. Now, what I would say is, he can raise -- he can raise the issues he is raising about the City staff with the hearing examiner by claiming that they are biased and that they have not appropriately treated his application under the code. If he has an appearance-of-fairness problem with the hearing examiner and believes that the hearing examiner is tainted and biased, that he has the ability to raise as well before the hearing examiner and ask the hearing examiner to recuse himself. So he has both of those --the ability to do both of those.

RP 43.

The Gerlachs' selective quotation of the City Attorney's argument is not representative of what was said to the trial court. *See* Opening Brief at 23-24. Moreover, it is unreasonable to believe that the trial court was misled where the trial judge considered and denied the Gerlachs' motion for reconsideration, in which the Gerlachs raised their arguments

{KNE1154938.DOCX;1/13023.050001/ }

regarding the City Attorney's alleged "mendacious" statements. Opening Brief at 10; CP 360, 370-71, 376.

- b. The Gerlachs may appeal the Hearing Examiner's decision to the Shoreline Hearings Board.

Further, the Gerlachs may appeal any unfavorable decision made by the City's Hearing Examiner to the Shoreline Hearings Board pursuant to RCW 90.58.180. That statute provides: "Any person aggrieved by the granting, denying, or rescinding of a permit on shorelines of the state pursuant to RCW 90.58.140 may seek review from the shorelines hearings board by filing a petition for review within twenty-one days of the date of filing of the decision..." *See also Samuel's Furniture, Inc. v. State, Dept. of Ecology*, 147 Wn.2d 440, 449, 54 P.3d 1194 (2002) ("Appeals of decisions to grant, deny, or rescind a substantial development permit pursuant to RCW 90.58.140 are heard by the SHB.").

While the Shoreline Hearings Board has held that it will not specifically address procedural arguments such as appearance of fairness violations on appeal, it has held that de novo review of decisions granting or denying shoreline permits provides adequate procedural safeguards to ensure that shoreline applications are properly decided on the merits. *Dunlap v. City of Nooksack*, SHB No. 02-026, 2003 WL 1827236 at *3 (April 3, 2003) (de novo hearing provides sufficient opportunity for the {KNE1154938.DOCX;1/13023.050001/ }

decision to be reviewed on the merits; determining whether or not procedural defects, other than those governed by the Shoreline Management Act and its regulations, occurred at the local level is not necessary to determining whether the decision made complies with the Shoreline Management Act, its implementing regulations or the local shoreline master program).

Previously, courts have dismissed declaratory judgment actions where relief was available before the Shoreline Hearings Board. *See, e.g., Harrington v. Spokane County*, 128 Wn. App. 202, 205, 114 P.3d 1233 (2005) (property owner's declaratory judgment action in superior court dismissed because he should have appealed designation of his property as a "shoreline" to the Shoreline Hearings Board under the Shoreline Management Act). Thus, where the Gerlachs may appeal the Hearing Examiner's decision to the Shoreline Hearings Board, their request for declaratory relief is improper and was correctly dismissed.

3. The appearance of fairness doctrine does not apply to the Planning Director's decision on the Gerlachs' SSDP application where no public hearing was held.

The Gerlachs allege the City violated RCW 42.36, the appearance of fairness doctrine. The appearance of fairness doctrine was first applied by the courts of this state in *Smith v. Skagit County*, 75 Wn.2d 715, 453

P.2d 832 (1969). Now codified at RCW 42.36, the intent of the doctrine is to ensure that *public hearings* that are adjudicatory in nature are both procedurally fair and are conducted by unbiased decisionmakers. *See, e.g., Raynes v. City of Leavenworth*, 118 Wn.2d 237, 245, 821 P.2d 1204 (1992) (“The appearance of fairness doctrine was judicially established in *Smith v. Skagit County*, 75 Wash.2d 715, 453 P.2d 832 (1969), to ensure fair *hearings* by legislative bodies. The doctrine requires that *public hearings* which are adjudicatory in nature meet two requirements: the *hearing* itself must be procedurally fair, and it must be conducted by impartial decisionmakers.”) (emphasis added); *Buell v. City of Bremerton*, 80 Wn.2d 518, 523, 495 P.2d 1358 (1972) (“Members of commissions with the role of conducting fair and impartial *fact finding hearings* must, as far as practicable, be open-minded, objective, impartial, free of entangling influences and capable of hearing the weak voices as well as the strong.”) (emphasis added); *Smith*, 75 Wn.2d at 740. RCW 42.36.010 also provides:

Application of the appearance of fairness doctrine to local land use decisions shall be limited to the quasi-judicial actions of local decision-making bodies as defined in this section. Quasi-judicial actions of local decision-making bodies are those actions of the legislative body, planning commission, hearing examiner, zoning adjuster, board of adjustment, or boards which determine the legal rights, duties, or privileges of specific parties *in a hearing or other*

{KNE1154938.DOCX;1/13023.050001/ }

contested case proceeding. Quasi-judicial actions do not include the legislative actions adopting, amending, or revising comprehensive, community, or neighborhood plans or other land use planning documents or the adoption of area-wide zoning ordinances or the adoption of a zoning amendment that is of area-wide significance.

(Emphasis added).

Thus, contrary to the Gerlachs' assertions, the appearance of fairness doctrine does not apply to administrative decisions where no public hearing is required and nor was the doctrine "designed to ensure the permit process is fair"; it only applies to quasi-judicial hearings. Opening Brief at 10.

Public land use hearings have been described and characterized for purposes of the appearance of fairness doctrine and Regulatory Reform, RCW 36.70B, as presupposing "that all matters upon which public notice has been given and on which public comment has been invited will be open to public discussion, and that persons present in response to the public notice will be afforded reasonable opportunity to present their views, consistent, or course, with the time and space available." *Smith*, 75 Wn.2d at 740. This type of procedure does not accurately describe or fit administrative land use decisions made by staff.

For this reason, Washington courts have refused to extend the appearance of fairness doctrine to administrative decisions made by staff in the absence of a public hearing:

For local land use decisions, the application of the appearance of fairness doctrine is limited to quasi-judicial actions of local decision making bodies that determine the legal rights, duties, or privileges of specific parties *in a hearing or contested case proceeding*. RCW 42.36.010. Particularly applicable to this situation, *the appearance of fairness doctrine 'has never been applied to administrative action, except where a public hearing was required by statute. The appearance of fairness requirements which have been developed for hearings are inappropriate in the building permit application process which necessarily involves frequent informal contacts between the applicant and employees of the building department.'* *Polygon Corp. v. City of Seattle*, 90 Wash.2d 59, 67–68, 578 P.2d 1309 (1978) (citations omitted)...

Here, *because a hearing is not required in Spokane's Type II [conditional use permit] application process, the appearance of fairness doctrine does not apply.* Furthermore, as stated in *Polygon*, the appearance of fairness doctrine is impractical in the realm of a permit application process.

Families of Manito v. City of Spokane, 291 P.3d 930, 938-39 (2013) (emphasis added); *See also Zehring v. City of Bellevue*, 103 Wn.2d 588, 591, 694 P.2d 638 (1985) (the appearance of fairness doctrine did not

apply to design review because no public hearing was required). The trial court correctly followed the precedent of *Families of Manito* and *Zehring* in finding the appearance of fairness doctrine inapplicable to the Planning Director's decision on the Gerlachs' SSDP application.

The Gerlachs have argued that once the City posts its required legal notice on a pending permit application, administrative hearings are underway and occur via "email, internet exchanges, and electronic public debates via a City-provided forum." Opening Brief at 16-17. The Gerlachs, therefore, refer to the staff's receipt of written public comments on an application as a "public hearing." *Id.* However, this ignores the *Smith* Court's description of what constitutes a "public hearing", which emphasizes "public discussion" where the public is "present" and afforded a reasonable opportunity to present their views. *Smith*, 75 Wn.2d at 740. It is also inconsistent with the definition of "open record hearings" as established by Regulatory Reform: "a hearing, conducted by a single hearing body or officer authorized by the local government to conduct such hearings, that creates the local government's record through testimony and submission of evidence and information, under procedures prescribed by the local government by ordinance or resolution." RCW 36.70B.020(3); *Ellensburg Cement Products, Inc. v. Kittitas County*, __

Wn.2d ___, 317 P.3d 1037, 1042 (2014). In making an administrative decision, planning staff may solicit input via a public comment period, but it does not invite the public to be present to discuss their views, submit evidence, and create a verbatim record. Moreover, according to RCW 36.70B.050 and .060, local governments may provide for “no more than one” open record hearing on a land use application. Thus, it would render the requirements of Regulatory Reform meaningless to equate eliciting public comments with a public hearing where the statute requires both a public comment period following a public notice of application and an open record appeal hearing. *See* RCW 36.70B.110(2)(e).

Simply put, under the Bainbridge Island Municipal Code (BIMC), the Planning Director issues an administrative decision under the Shoreline Substantial Development Permit Process. CP 237; BIMC 16.12.360.E.4. No hearing on the underlying permit decision (the SSDP) is permitted unless and until it is appealed to the Hearing Examiner, who holds the first and only open-record public hearing. *Id.* Accordingly, pursuant to the holdings in the *Families of Manito*, *Polygon*, and *Zehring* cases, the appearance of fairness doctrine does not apply to the Gerlachs’ permit application at all because it is an administrative decision made without a public hearing. For that reason, the Gerlachs’ complaints about

the alleged bias of Heather Beckmann, Joshua Machen, and Kathy Cook, including their bias as a result of the Gerlachs' ongoing litigation against the City, do not trigger the appearance of fairness doctrine even if they were considered true. The trial court did not err in dismissing the Gerlachs' claims because the appearance of fairness doctrine does not apply to the Planning Director's decision on their permit application.⁵

4. The Gerlachs' allegations regarding improper conduct by Maradel Gale, even if true, do not implicate the appearance of fairness doctrine because she was not a decisionmaker on the Gerlachs' SSDP application.

The courts of this State have repeatedly held that the appearance of fairness doctrine only applies to judicial and quasi-judicial *decisionmakers*. RCW 42.36.010 ("Application of the appearance of fairness doctrine to local land use decisions shall be limited to the quasi-judicial actions of local decision-making bodies..."); *State v. Finch*, 137 Wn.2d 792, 808, 975 P.2d 967 (1999) (holding that a county prosecutor is not subject to the appearance of fairness doctrine when making a charging

⁵ The Gerlachs provided to the trial court and this Court via appendices declarations from non-lawyers stating that the appearance of fairness doctrine was violated. These declarations should not be considered by the Court as they inappropriately present non-lawyer "experts" to draw a legal conclusion about the application of the appearance of fairness doctrine. On a motion for summary judgment, arguments or opinions on points of law should be presented in the form of a brief, not in an affidavit or declaration. See Karl B. Tegland, 14A *Washington Practice: Civil Procedure* § 25:10 (2d ed.); *Washington State Physicians Ins. Ex. & Ass'n v. Fisons Corp.*, 122 Wn. 2d 299, 858 P.2d 1054 (1993) ("Legal opinions on the ultimate legal issue before the court are not properly considered under the guise of expert testimony.").
{KNE1154938.DOCX;1/13023.050001/ }

decision because the prosecutor is not a quasi-judicial decisionmaker); *Carrick v. Locke*, 125 Wn.2d 129, 143 n. 8, 882, P.2d 882 (1994) (holding that a county prosecutor is not subject to the appearance of fairness doctrine when participating in an inquest because the prosecutor is not the decisionmaker); *State v. Post*, 118 Wn.2d 596, 618, 826 P.2d 172 (1992) (holding that a probation officer is not the decisionmaker at a sentencing hearing and is therefore not subject to the appearance of fairness doctrine). Where a person who is alleged to be biased is not a quasi-judicial decisionmaker on the matter at hand, the doctrine does not apply and the actual decisionmakers are not disqualified by the alleged bias. *Id.*

Even assuming *arguendo* that the appearance of fairness doctrine applies, Maradel Gale is clearly not a decisionmaker on the Gerlachs' SSDP application. First, Ms. Gale submitted her comment letter as a private citizen during the public comment period on the Gerlachs' application – not in her capacity as a member of the Planning Commission. CP 90-91, 229. Her comments appear on her own, private stationery, and do not mention or indicate in any way that she is a member of the City Planning Commission, or that she was using her position as a Planning Commission member as a basis for her comments. *Id.*

Second, under the Bainbridge Island Municipal Code, the initial decision on an SSDP application is made by the City Planning Director, Kathy Cook. CP 237. If that initial decision is appealed, the appeal is heard by the City Hearing Examiner, Stafford Smith. *Id.* While the Code allows the Planning Director to ask for a recommendation from the City Planning Commission prior to issuing her initial decision, no such recommendation of the Commission was sought in this case. *Id.* Thus, Ms. Gale's comment could not be construed as one made by a decisionmaker where the Planning Commission was not involved in the Gerlachs' SSDP application review. Regardless of whether the trial court found Ms. Gale's participation to be troubling, any comments she submitted in her individual capacity were not subject to the appearance of fairness doctrine because she was not a decisionmaker.

The Gerlachs cite *Hayden v. Port Townsend*, 28 Wn. App. 192, 622 P.2d 1291 (1981), for the proposition that it is improper for planning commissioners to inject their personal opinions into the process. Of course, in *Hayden*, the planning commissioners actually had the application pending before them. They were charged with making a recommendation to the city council, and the court held that it was improper for them to use their personal opinions to decide the matter,

rather than the evidence in the hearing. Here, as pointed out previously, the planning commission has no role in shoreline permits, and the *Hayden* case is therefore inapplicable.

Moreover, the Gerlachs' accusations against Planning Manager Joshua Machen and Associate Planner Heather Beckmann, while patently untrue, are also irrelevant for purposes of the appearance of fairness doctrine. Joshua Machen was not involved in the Gerlachs' SSDP application review process at all given the Gerlachs' history of complaints. CP 229, 236, 240. In addition, Heather Beckmann merely gave recommendations to the Planning Director, Kathy Cook, on the Gerlachs' application, which was decided upon without a public hearing. Neither of these individuals can be considered "decisionmakers" for purposes of the appearance of fairness doctrine, and the trial court correctly determined the doctrine was not violated in this case.

5. There is no authority in law to transfer the Gerlachs' permit to Kitsap County.

While the trial court granted summary judgment to the City on the basis that the Gerlachs already had access to alternative remedies via an appeal to the Hearing Examiner and that the appearance of fairness doctrine had never been extended to administrative action in the absence of a public hearing, this Court may also affirm on the basis that the

{KNE1154938.DOCX;1/13023.050001/ }

Gerlachs' requested relief - transfer of their permit to Kitsap County for processing - is not an available remedy at law. An appellate court may affirm a grant of summary judgment on an issue not decided by the trial court provided that it is supported by the record and is within the pleadings and proof. *Plein v. Lackey*, 149 Wn.2d 214, 222, 67 P.3d 1061 (2003).

There is no legal authority for the proposition that potential or actual violations of the appearance of fairness doctrine authorize removal of a permitting decision to another jurisdiction. Even *assuming arguendo* that the appearance of fairness doctrine applies to the Gerlachs' SSDP application - despite its lack of public hearing - there is no case which holds that an entire agency is disqualified by the doctrine. To the contrary, RCW 42.36.090 provides:

In the event of a challenge to a member or members of a decision-making body which would cause a lack of a quorum or would result in a failure to obtain a majority vote as required by law, any such challenged member(s) shall be permitted to fully participate in the proceeding and vote as though the challenge had not occurred, if the member or members publicly disclose the basis for disqualification prior to rendering a decision. Such participation shall not subject the decision to a challenge by reason of violation of the appearance of fairness doctrine.

(Emphasis added). Thus, under any circumstances wherein an appearance of fairness challenge is raised, the statute provides absolutely no legal

{KNE1154938.DOCX;1/13023.050001/ }

authority to require transfer of the decision to another jurisdiction. Rather, out of necessity, the challenged members of the body (or in this case City staff) are permitted to fully participate in the decision.

Moreover, in *Grandmaster*, the court refused the appellants' request to remove land use decisionmaking authority from the County as a whole. There, the appellants argued that the trial court should have granted declaratory relief before the County made its decision about whether a conditional use permit was required on the project because the County had a clear conflict of interest. In other words, the neighbors argued it would be futile to wait for the County to make a decision that would be against its own interests (the County had already entered into an agreement with Weyerhaeuser and the State Department of Natural Resources for mining purposes), thereby encouraging the court to make the decision via declaratory order. *Grandmaster*, 110 Wn. App. at 109-10. The court rejected their "highly unusual" argument, stating the appearance of fairness doctrine cases cited by the appellants "do not provide authority for removing the decision from DDES [the County] in this case. *None of the cases cited holds that an agency, as a whole, should not be allowed to proceed with this sort of decision because of suggestions of conflicts of interest.*" *Id.* at 111 (emphasis added).

The only authority the Gerlachs have cited to support their request for transfer of their permit to Kitsap County, after the trial court prompted them to do so, is the court's equitable power to craft a remedy. RP 5, CP 365. However, because "equitable remedies are extraordinary forms of relief, available solely when an aggrieved party lacks an adequate remedy at law" and because a remedy at law exists, the trial court did not err in denying a request in equity to transfer the permit. *Ahmad v. Town of Springdale*, __ Wn. App. __, 314 P.3d 729, 733 (2013) (denying equitable writs of prohibition and mandamus to prohibit town from enforcing the building code against a property where the owner could have appealed any enforcement action taken). As argued above, a legal remedy already exists for the Gerlachs via an appeal to the neutral Hearing Examiner and the Shoreline Hearings Board. Accordingly, the Court may affirm denial of the declaratory relief sought by the Gerlachs on the additional grounds that there is no legal authority to transfer their permit to another jurisdiction for processing.

6. The City's conduct did not violate any duty of good faith and fair dealings.

The Gerlachs argue the City breached its duty to treat the Gerlachs in good faith. Opening Brief at 14-15. The common law duty of good faith and fair dealings is a *contractual* duty, *i.e.*, our courts have held that

{KNE1154938.DOCX;1/13023.050001/ }

an implied duty of good faith and fair dealing exists *in every contract*.⁶ *Badgett v. Security State Bank*, 116 Wn.2d 563, 569, 807 P.2d 356 (1991). This duty “obligates the parties to cooperate with each other so that each may obtain the full benefit of performance.” *Id.* The duty requires only that the parties perform in good faith the specific obligations set forth in their agreement; it does not inject any substantive terms into the contract or create any free-floating duty of good faith independent of the contract terms. *Id.* at 569-70; *Barrett v. Weyerhaeuser Co. Severance Pay Plan*, 40 Wn. App. 630, 635-36 n. 6, 700 P.2d 338 (1985).

The City has only executed one contract with the Gerlachs. Namely, the City entered into a settlement agreement with the Gerlachs prior to their appeal hearing on the programmatic buoy permit denial. CP 245. Therefore, the Gerlachs’ causes of action for breach of the covenant of good faith and fair dealing and retaliation must fail because they do not allege a breach of the settlement agreement relating to the programmatic buoy. Rather, the Gerlachs’ claims allege disparate and unfair treatment with respect to their current SSDP application, for which no contract or settlement agreement exists.

⁶ There is no “statutory duty of good faith and fair dealings” for municipal officers in the State of Washington. The Gerlachs’ Complaint cites to no such statute and a diligent search of the Revised Code of Washington reveals that no such statute exists. The Gerlachs’ claims regarding breach of a statutory duty are without any basis in law. {KNE1154938.DOCX;1/13023.050001/ }

Furthermore, as previously stated, in the settlement agreement negotiations City Attorney Jack Johnson expressly refused to incorporate a covenant of good faith and fair dealing with respect to future permits, stating: “The City has an obligation to treat the applications of the Gerlachs and every other citizen in good faith, but I am not going to have the City make such general obligations into contractual settlement terms. The Gerlachs need not fear retaliation.” CP 207. Thus, a contractual commitment to process the Gerlachs’ future applications in good faith was expressly rejected by the City and was not incorporated into the settlement agreement. *Id.* Certainly, the City may not make unsupportable land use decisions that are not based upon the applicable criteria. However, to the extent the Gerlachs believe the City has treated them disparately and unfairly, the Hearing Examiner may determine whether this occurred when deciding upon the merits of their SSDP appeal.

7. The Gerlachs are collaterally estopped from re-litigating the same factual issues regarding Machen’s solicitation of the Gerlachs and the processing of their original mooring buoy permit applications.

The Court may also affirm the trial court’s grant of summary judgment to the City on the grounds that the Gerlachs are collaterally estopped from re-litigating the same factual issues regarding Joshua Machen’s alleged window-washing solicitation. The Gerlachs’ claims

{KNE1154938.DOCX;1/13023.050001/ }

alleging violations of appearance of fairness, covenants of good faith and fair dealing, and retaliation rest entirely upon the premise that then-Associate Planner Joshua Machen solicited the Gerlachs for their window washing business during the pendency of their original mooring buoy permit filed in 2005. The Gerlachs seem to claim that this alleged initial interaction with Machen, and the Gerlachs subsequent refusal to hire Machen, tainted all subsequent interactions with City staff.

However, the U.S. District Court in *Gerlach v. City of Bainbridge Island*, Cause No. 3:11-cv-05854-BHS, held that the Gerlachs' inference that Machen was soliciting their business and basing his permit decision on their refusal to hire him was "essentially a conclusory inference unsupported by the facts." CP 225. Judge Settle further stated that, even assuming the Gerlachs' allegations were true, the Gerlachs "failed to show that the justifications given for denying the permit were unreasonable or that there was a lack of a legitimate governmental objective." *Id.* Finally, the Order stated that the Gerlachs had failed to prove that Machen's "alleged abuse of power" was the cause of their programmatic buoy permit denial "where the decision to deny the permit was made by a group of officials, rather than in Machen's sole discretion." *Id.* The Ninth Circuit recently affirmed, stating that the Gerlachs' § 1983 claim against

Machen failed because they had “not adduced evidence to prove that Machen caused their alleged injuries.” *Gerlach v. City of Bainbridge Island*, No. 12-35888, slip op. at 3 (9th Cir. Jan. 6, 2014).

Thus, to the extent the Gerlachs incorporate the arguments made in U.S. District Court that: (a) Machen actually solicited the Gerlachs for their window washing business, and (b) the City retaliated against them in denying their previous mooring buoy permit or programmatic mooring buoy permit, those issues have already been decided. To the extent that the Gerlachs continue to insist that their alleged interaction with Machen still colors the City’s decisionmaking on their SSDP application today, these accusations are also highly suspect given the findings made in the previous civil case.

Specifically, the U.S. District Court’s finding that the inference made by the Gerlachs that Machen was soliciting their business and basing a decision on their permit on their refusal to hire him was “essentially a conclusory inference unsupported by the facts” poisons the entire basis of the Gerlachs’ claims. The Gerlachs claim that “[w]hen [they] refused to hire the window washing City Planner (Machen), the City initiated a scheme of retribution. The acts of retribution stemming from the denial of a simple mooring buoy permit, were not based in law (municipal code) or

fact (non-existent permit criteria/counterfeit maps.” Opening Brief at 30. Thus, the Gerlachs perceive Machen’s alleged solicitation as the entire basis, aside from Maradel Gale’s alleged “directive”, for disqualifying all City staff from processing their SSDP application and is the core of their appearance of fairness, good faith and fair dealing, and retaliation claims. Accordingly, to the extent the Gerlachs rely upon these initial interactions with Machen as evidence supporting their claims, the Gerlachs’ Motion for Summary Judgment was properly denied.

The Gerlachs are collaterally estopped from raising the solicitation and retaliation (based on their refusal) issues again because they are identical to the factual allegations raised in the current litigation; the factual issue regarding Machen’s solicitation of the Gerlachs was decided in a final judgment on the merits, *i.e.*, an order granting summary judgment; the Gerlachs were parties in the previous litigation; and the application of the doctrine would not work an injustice because the Gerlachs had a full and fair opportunity to litigate the matter in U.S. District Court. *See State v. Vasquez*, 148 Wn.2d 303, 308, 59 P.3d 648 (2002) (The party asserting collateral estoppel bears the burden of proving: (1) the issue decided in the prior adjudication is identical with the one presented in the second action; (2) the prior adjudication must have

ended in a final judgment on the merits; (3) the party against whom collateral estoppel is asserted was a party or in privity with the party to the prior adjudication; and (4) application of the doctrine does not work an injustice). For this reason, even if the Court concludes that the trial court erred in determining the previously discussed legal issues regarding the availability of declaratory relief or the application of the appearance of fairness doctrine to the Planning Director's decision, the Court need not remand the case to the trial court to make findings of fact and may affirm dismissal.

8. Should the Court determine that summary judgment was improperly granted to the City, the trial court still correctly denied summary judgment in favor of the Gerlachs where the City raised multiple issues of material fact.

If the Court concludes that summary judgment was improperly granted to the City, the Court may remand the matter to the superior court because the City raised multiple issues of material fact, precluding summary judgment on behalf of the Gerlachs. The disputed factual issues raised by the City before the trial court were material because they are the foundation upon which the Gerlachs allege bias on the basis of personal interest, prejudgment of the issues, and partiality under the appearance of fairness doctrine. They also are the basis upon which the Gerlachs' claims

for violation of good faith and fair dealing and retaliation rest. Specific material facts that the City disputed include:

- Joshua Machen rebutted the allegation that he solicited the Gerlachs for their window washing business during the pendency of their original mooring buoy permit application submitted in 2005. Rather, Machen stated that he merely told Mr. Gerlach that he knew where their house was located because he had worked for the Gerlachs' neighbors. CP 276.
- The City rebutted the Gerlachs' allegation that it took six years for the Gerlachs to obtain a mooring buoy permit as a result of the City's bias against the Gerlachs. Rather, the delay was due to the Gerlachs' voluntary withdrawal of their applications and application for a "programmatic" buoy, which was ill-suited to their property. CP 243-44.
- The City rebutted that Joshua Machen has influenced the processing and outcome of the Gerlachs' SSDP application. He has not seen the application, has not discussed the current application with either Heather Beckmann or Kathy Cook, and has not participated in or informed the analysis with respect to the current application. CP 229, 236, 240.

- Ms. Gale did not “direct” Beckmann to deny the Gerlachs’ application as a member of the City’s Planning Commission. CP 90-91, 229. Ms. Gale’s letter is written in her capacity as a private citizen, on her own stationery, and it does not give any direction to Beckmann. *Id.* In addition, the Planning Commission was not involved at all in the processing of the Gerlachs’ SSDP application. CP 237.
- The City rebutted the Gerlachs’ allegations that Heather Beckmann concealed the identities of persons commenting on the Gerlachs’ application because of bias toward the Gerlachs or an intent to retaliate against the Gerlachs. Rather, Ms. Beckmann accepted anonymous comment letters on the application, which the City has historically accepted. According to Ms. Beckmann, Mr. Gerlach never specifically asked her to reveal the identities of these individuals, but only asked whether it was common that persons anonymously comment on applications. When Ms. Beckmann was asked during the course of the criminal investigation to reveal the identity of the anonymous commenter, she did so. CP 229-30.
- Heather Beckmann explained the reasons for denying the portion of the Gerlachs’ SSDP application requesting permission to

construct a concrete bulkhead, establishing the City's legitimate, non-retaliatory reasons for denying the application, even though an application for a concrete bulkhead had been issued by the City nine years earlier. CP 230-33.

- Heather Beckmann explained the reasons for requiring Mr. Gerlach to produce an eelgrass survey, which city staff utilizes to analyze the potential impacts of development in the shoreline. CP 230. While Ms. Beckmann requested a site-specific and current (within two years) eel grass survey from Mr. Gerlach, this requirement is the Washington Department of Fish and Wildlife's standard practice and was not uniquely applied to the Gerlachs as a result of any retaliatory or improper motive. *Id.*

All of the evidence the Gerlachs cite to prove the City violated the appearance of fairness doctrine, a covenant of good faith and fair dealing, or a covenant against retaliation has been rebutted and reasonably explained, creating an issue of material fact precluding summary judgment.

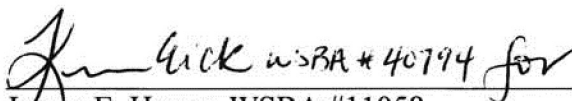
E. CONCLUSION

For the foregoing reasons, the City requests that the Court affirm the trial court's decision to grant summary judgment on behalf of the City

and deny the Gerlachs' motion for summary judgment. The Gerlachs' claims fail as a matter of law because they are not entitled to the relief that they seek. The trial court did not abuse its discretion in determining that declaratory judgment was unavailable because the Gerlachs have existing remedies at law via appeals to the Hearing Examiner and the Shoreline Hearings Board. In addition, the City has demonstrated that the appearance of fairness doctrine simply does not apply to the Gerlachs' SSDP application where no public hearing is held on the administrative decision made by the Planning Director. The Gerlachs also are not entitled to transfer of the permit to another jurisdiction for processing. To do so would set a dangerous precedent of stripping jurisdictions of their ability to govern and oversee land use matters within their own community.

RESPECTFULLY SUBMITTED this 24th day of March, 2014.

OGDEN MURPHY WALLACE, P.L.L.C.

By 
James E. Haney, WSBA #11058
Attorney for City of Bainbridge Island

DECLARATION OF SERVICE

I, Charolette Mace, declare as follows:

1. I am a citizen of the United States, a resident of the State of Washington, and an employee of Ogden Murphy Wallace, P.L.L.C. I am over eighteen years of age, not a party to this action, and am competent to be a witness herein.

2. On the date below, I filed this Respondent City of Bainbridge Island's Response Brief with the Court of Appeals, Division II, and served a copy of said document via U.S. Mail on the following Appellants:

Marcus Gerlach, WSBA 33963
Suzanne L. Gerlach
579 Stetson Place
Bainbridge Island, WA 98110
Appellants

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at Seattle, Washington this 24th day of March, 2014.



Charolette Mace, *Legal Assistant*